No. 06-376

# In the Supreme Court of the United States

JOHN F. HINCK, ET UX., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Solicitor General*
*Counsel of Record*
EILEEN J. O'CONNOR
*Assistant Attorney General*
KENNETH L. GREENE
BETHANY B. HAUSER
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether, pursuant to 26 U.S.C. 6404(h) (Supp. III 2003), the Tax Court has exclusive jurisdiction to review determinations of the Internal Revenue Service not to grant a taxpayer's request for interest abatement under 26 U.S.C. 6404(e)(1).

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 1
Argument ..... 5
Conclusion ..... 16
Appendix ..... 1a


## TABLE OF AUTHORITIES

Cases:


*Alexander* v. *Sandoval*, 532 U.S. 275 (2001) ..... 9
*Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994) ..... 6
*Beall* v. *United States*, 336 F.3d 419 (5th Cir. 2003) ..... 4, 5, 12, 13
*Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) ..... 8
*Broum* v. *General Servs. Admin.*, 425 U.S. 820 (1976) ... 9
*Freytag* v. *Commissioner*, 501 U.S. 868 (1991) ..... 10
*Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991) ..... 6
*Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991) ..... 6
*Smith* v. *Robinson*, 468 U.S. 992 (1984) ..... 9
*Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) ..... 4, 9, 10, 11

Constitution and statutes: Page

U.S. Const.:
Art. I ..... 11
Art. II, § 2, Cl. 2 ..... 10
Equal Access to Justice Act, 28 U.S.C. 2412:
28 U.S.C. 2412(d) ..... 14
28 U.S.C. 2412(d)(2)(B) ..... 7
Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762 ..... 6
Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 ..... 11
§ 301(a), 110 Stat. 1457 ..... 6, 7
§ 301(c), 110 Stat. 1457 ..... 7
§ 302(b), 110 Stat. 1458 ..... 7
Tucker Act, 28 U.S.C. 1491(a) ..... 3
26 U.S.C. 6404 (1982) ..... 6
26 U.S.C. 6404 (1994) ..... 6
26 U.S.C. 6404 (2000 & Supp. III 2003) ..... 5, 6
26 U.S.C. 6404(e)(1) (1994) ..... *passim*
26 U.S.C. 6404(e)(1) ..... 2, 7
26 U.S.C. 6404(g) (Supp. II 1996) ..... 2
26 U.S.C. 6404(h) (Supp. III 2003) ..... *passim*
26 U.S.C. 6404(h)(1) (Supp. III 2003) ..... 7, 8, 9, 14
26 U.S.C. 6406(h)(2)(B) (Supp. III 2003) ..... 7, 8
26 U.S.C. 6404(h)(2)(C) (Supp. III 2003) ..... 7
26 U.S.C. 6532(a)(1) ..... 9
26 U.S.C. 7430 ..... 5, 7
26 U.S.C. 7430(c)(4)(A)(ii) ..... 7

Statutes–Continued: Page

28 U.S.C. 1346(a)(1) ..... 3
42 U.S.C. 1983 ..... 9

Miscellaneous:

141 Cong. Rec. 2025 (1995) ..... 13
H.R. Rep. No. 506, 104th Cong., 2d Sess. (1996) ..... 4, 11, 12, 13

# In the Supreme Court of the United States

No. 06-376

JOHN F. HINCK, ET UX., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 446 F.3d 1307. The opinion of the Court of Federal Claims (Pet. Supp. App. 76-106) is reported at 64 Fed.Cl. 71.

### JURISDICTION

The judgment of the court of appeals was entered on May 4, 2006. The petition for a writ of certiorari was filed on July 28, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioners John F. Hinck and Pamela F. Hinck filed a joint federal income tax return for 1986. Pet. App. 4. A decade later, while their 1986 tax year was under examination, petitioners made an advance remit-

tance to the Internal Revenue Service (IRS). *Ibid.* Four years later, the IRS made an agreed adjustment to petitioners' 1986 liability, assessed the resulting tax, interest, and penalties, and refunded to petitioners the balance of their advance remittance. *Ibid.*; Pet. Supp. App. 78-79. Petitioners subsequently filed an administrative claim for refund, which included a request that the IRS abate interest under 26 U.S.C. 6404(e)(1). Pet. App. 4; Pet. Supp. App. 80. After the IRS denied that refund request, petitioners, as relevant here, filed suit in the Court of Federal Claims seeking review of the IRS's refusal to abate the interest. Pet. App. 4.

2. The Court of Federal Claims dismissed petitioners' suit for lack of jurisdiction. Pet. Supp. App. 76-106. The court first noted that, as originally enacted, Section 6404(e)(1) (26 U.S.C. 6404(e)(1) (1994)) provided that the IRS "may" abate interest assessed with respect to a deficiency if the interest was attributable to "any error or delay" by the IRS in performing a ministerial act. Pet. Supp. App. 80-81. The court next noted that, in 1996, Section 6404(e)(1) was amended to add the modifier "unreasonable" before "any error or delay," 26 U.S.C. 6404(e)(1), and that a new provision, 26 U.S.C. 6404(g) (Supp. II 1996) (which is now found at 26 U.S.C. 6404(h) (Supp. III 2003)), was added to provide for review in the Tax Court of the denial of a request for abatement. Pet. Supp. App. 81-82. The court observed that, according to the amendments' effective dates, the first amendment—the addition of the modifier "unreasonable"—did not apply to the case before it, but that the second amendment—providing for review in the Tax Court—did apply to the case before it. *Ibid.* The court explained that, prior to its amendment in 1996, the permissive language of Section 6404(e)(1)—*i.e.*, the use of

the word "may" and the absence of any standard by which the IRS's decision might be judged—had consigned the determination whether to abate interest to the Commissioner's sole discretion, with the result that the Commissioner's determination not to abate interest was not reviewable by the courts. *Id.* at 89-93. Because the applicable version of Section 6404(e)(1) was unchanged from the version of that subsection at issue in earlier cases, the court reasoned, the IRS's determination remained unreviewable. *Id.* at 95-97.

The court further explained that its jurisdiction in tax refund suits derived solely from the Tucker Act, 28 U.S.C. 1491(a), and not from 28 U.S.C. 1346(a)(1), which grants the federal district courts concurrent jurisdiction in tax refund suits. Pet. Supp. App. 87. Tax refund suits, the court reasoned, represent a category of cases arising under the Tucker Act that involves the illegal exaction of money. *Id.* at 85. If the decision whether to abate interest is consigned to agency discretion, the court explained, the IRS's refusal to abate interest cannot be "illegal." *Id.* at 89. Thus, the court concluded, it lacks subject-matter jurisdiction to review any issue consigned to agency discretion, including the Commissioner's determination not to abate interest under the version of Section 6404(e)(1) at issue here. *Id.* at 89, 105-106.

3. The court of appeals affirmed, but on different grounds. Pet. App. 1-17. It held that 26 U.S.C. 6404(h) (Supp. III 2003) granted the Tax Court exclusive jurisdiction to review the Commissioner's determination not to abate interest under Section 6404(e)(1).[1] Pet. App. 11.

---

[1] The Federal Circuit thus found it unnecessary to reach the justiciability question addressed by the Court of Federal Claims. The

The Federal Circuit explained that the statute expressly grants jurisdiction only to the Tax Court, specifies a particular procedure and standard of review to be used by that court, and grants the Tax Court the power to issue a remedy. *Id.* at 11-12. The Federal Circuit also found it significant that the Tax Court is a specialized court with expertise in tax matters. *Id.* at 13. It emphasized that where statutory review procedures are designed to permit agency expertise to be brought to bear on the matter, those procedures are presumed to be exclusive. *Id.* at 12 (quoting *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965)).

The Federal Circuit also observed that the legislative history of 26 U.S.C. 6404(h) (Supp. III 2003) confirms that the Tax Court has exclusive jurisdiction over interest-abatement claims. Pet. App. 13-14. The court noted that, although Congress observed in the House Report (H.R. Rep. No. 506, 104th Cong., 2d Sess. 28 (1996)) that then-existing law denied jurisdiction to any court to review the IRS's refusal to abate interest, Congress's response was not to grant jurisdiction to the district courts and the Court of Federal Claims, but, instead, to vest jurisdiction only in the Tax Court. Pet. App. 13-14.

The Federal Circuit acknowledged (Pet. App. 16) that its decision was in conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003). It stated, however, that the procedural anomalies identified by the Fifth Circuit—that some taxpayers would have to split their claims and that other taxpayers'

---

justiciability question lacks continuing importance in any event because the enactment of Section 6404(h) made it clear that the IRS's decision not to abate interest could be challenged in the Tax Court for an abuse of discretion.

interest-abatement claims would not be reviewable in any forum—did not persuade it to construe the statute differently. Pet. App. 16-17. The legislative history, the Federal Circuit explained, clearly established that Congress intended that, under Section 6404(h), taxpayers who exceeded the net-worth requirements for seeking attorneys' fees under 26 U.S.C. 7430 could not seek review of the IRS's interest-abatement determination. Pet. App. 16. The Federal Circuit further explained that Congress was well aware that district courts had jurisdiction over refund claims, but nonetheless specifically granted only the Tax Court jurisdiction to review interest-abatement requests. Thus, the possibility that some claims might be split did not compel the court to ignore the clear statutory language. *Id.* at 16-17.

## ARGUMENT

The court of appeals correctly held that the Tax Court has exclusive jurisdiction to review the Commissioner's decision to abate interest under 26 U.S.C. 6404 (2000 & Supp. III 2003), and that the Court of Federal Claims therefore lacked jurisdiction over petitioners' claim. The decision below does conflict with the Fifth Circuit's decision in *Beall* v. *United States*, 336 F.3d 419 (2003), which held that Tax Court jurisdiction to review IRS interest-abatement decisions was not exclusive, and that district courts also had such jurisdiction. In addition, the question presented is a recurring one that has substantial administrative importance. Thus, the question presented may warrant this Court's review at an appropriate time. Nevertheless, given that the Federal Circuit's decision directly affects only the jurisdiction of the Court of Federal Claims and is not binding on the jurisdiction of any district court, the Court may prefer

to await a concrete conflict affecting the jurisdiction of the federal district courts before reviewing the question.

1. The Secretary of the Treasury is authorized to abate a tax or liability assessment in certain circumstances. 26 U.S.C. 6404 (2000 & Supp. III 2003). In 1986, Congress amended 26 U.S.C. 6404 (1982) by adding new subsection (e)(1), which for the first time authorized the Secretary to grant an abatement of interest attributable to ministerial errors and delays by the IRS. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1563(a), 100 Stat. 2762. Several courts held that the Secretary's decision not to grant such an abatement under subsection (e)(1) was not judicially reviewable, because that subsection provided no tests or standards by which to adjudicate the correctness of the determination, thus consigning the decision whether to abate interest to the Secretary's sole discretion. See *Argabright* v. *United States*, 35 F.3d 472 (9th Cir. 1994); *Selman* v. *United States*, 941 F.2d 1060 (10th Cir. 1991); *Horton Homes, Inc.* v. *United States*, 936 F.2d 548 (11th Cir. 1991).

2. In 1996, Congress again amended 26 U.S.C. 6404 (1994) to add present subsection (h). Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 301(a), 110 Stat. 1457. That subsection provides for Tax Court review of the Commissioner's determination not to abate interest:

> The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing

> of the Secretary's final determination not to abate such interest.

26 U.S.C. 6404(h)(1) (Supp. III 2003). The reference to 26 U.S.C. 7430 restricts the availability of review to individual taxpayers whose net worth does not exceed $2 million, and businesses whose net worth does not exceed $7 million. See 26 U.S.C. 7430(c)(4)(A)(ii); 28 U.S.C. 2412(d)(2)(B). Section 6404(h) also provides that, if the Tax Court determines that the IRS abused its discretion in declining to abate interest, it may order a refund. 26 U.S.C. 6404(h)(2)(B) (Supp. III 2003). It further provides that an order of the Tax Court under Section 6404(h) is reviewable by the courts of appeals, but "only with respect to the matters determined in such order." 26 U.S.C. 6404(h)(2)(C) (Supp. III 2003).

At the same time that it added subsection (h), Congress amended subsection (e)(1) by adding the word "unreasonable" before the words "error or delay," and by changing the words "ministerial act" to "ministerial or managerial act." Taxpayer Bill of Rights 2, § 301(a), 110 Stat. 1457. Congress gave different effective dates to the two amendments, however, with the result that the present case is subject to subsection (h), but is governed by the original version of Section 6404(e)(1).[2]

---

[2] The amendments to subsection (e)(1) are effective for interest accruing with respect to deficiencies or payments for tax years beginning after July 30, 1996. Taxpayer Bill of Rights 2, § 301(c), 110 Stat. 1457. Subsection (h), however, is effective for all requests for abatement submitted to the IRS after July 30, 1996, regardless of the tax year involved. § 302(b), 110 Stat. 1458.

The copy of Section 6404(e)(1) reproduced in petitioner's appendix (Pet. App. 42) is not an accurate copy of either the original statute (effective for tax years ending on or before July 30, 1996, including the year at issue here) or the amended statute (effective for all later tax

3. As the court of appeals here correctly concluded (Pet. App. 11), Section 6404(h) grants to the Tax Court exclusive jurisdiction to review the IRS's determination not to abate interest under Section 6404(e)(1). The court of appeals thus correctly declined to follow the Fifth Circuit's contrary decision in *Beall*, which held that the enactment of Section 6404(h) did not grant the Tax Court exclusive jurisdiction in these matters. 336 F.3d at 428-430; Pet. App. 34-36.

a. The grant of jurisdiction to the Tax Court in 26 U.S.C. 6404(h) (Supp. III 2003) provides for exclusive Tax Court review. By its plain language, Section 6404(h) grants jurisdiction to a particular court—the Tax Court—to review the Secretary's denial of interest abatements, and also provides a particular standard—abuse of discretion—to be applied by that court. 26 U.S.C. 6404(h)(1) (Supp. III 2003) ("The Tax Court shall have jurisdiction over any action * * * to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion."). Section 6404(h) also gives the Tax Court the power to issue a remedy, by ordering an abatement, 26 U.S.C. 6404(h)(1), and, if necessary, determining an overpayment, 26 U.S.C. 6404(h)(2)(B) (Supp. III 2003). Cf. *Block* v. *Community Nutrition Inst.*, 467 U.S. 340 (1984) (holding that a statute clearly conferring the right to judicial review in some circumstances and for some classes of claimants may impliedly preclude judicial review in other circumstances and for other classes).

---

years): it includes the words "unreasonable" and "or managerial" in some, but not all, of the places they appear in the amended statute. A correct copy of Section 6404(e)(1), as it applies to this case, is reproduced at App., *infra*, 1a.

This Court has explained "[i]n a variety of contexts" that "a precisely drawn, detailed statute pre-empts more general remedies." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976) (citing cases). In *Brown* itself, this Court held that the specific and express provision for administrative and judicial review in Section 717 of the Civil Rights Act of 1964, governing discrimination in federal employment, precluded any reliance on Title VII, even though the terms of Title VII were broad enough to apply to federal employment. *Id.* at 831-835; see *Alexander* v. *Sandoval*, 532 U.S. 275, 290 (2001) ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."). See also, *e.g.*, *Smith* v. *Robinson*, 468 U.S. 992, 1011-1012 (1984) (refusing to permit claims under 42 U.S.C. 1983 where Congress provided a more restrictive private remedy in another statute). Here, Congress has expressly provided for review in the Tax Court, and has limited the class of taxpayers who may challenge an interest-abatement determination. In addition, it has provided a 180-day statute of limitations period for challenges to interest-abatement determinations in the Tax Court, see 26 U.S.C. 6404(h)(1) (Supp. III 2003), whereas the general limitations period for refund claims in district court is two years, see 26 U.S.C. 6532(a)(1). It would be inconsistent with Congress's limited remedial scheme to permit all taxpayers to bring interest-abatement claims in district court.

Similarly, this Court has explained that where "Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are presumed to be exclusive." *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965). Here, as

in *Whitney National Bank*, Congress has established a "carefully planned and comprehensive method for challenging [administrative] determinations." *Ibid.* In that case, the Court explained that, in establishing a particular statutory review procedure, Congress intended to permit an agency—in that case, the Federal Reserve Board—to pass on matters within its area of expertise. *Ibid.* Under those circumstances, "[t]o permit a district court to make the initial determination * * * would substantially decrease the effectiveness of the statutory design." *Ibid.* Accordingly, the Court held that the statutory review procedure was "the sole means" by which the administrative determination might be reviewed. *Id.* at 419.

As the Federal Circuit concluded, the same reasoning applies here: "Even though the Tax Court is not an agency, it is a specialized court with expertise in tax matters. * * * In this context, permitting the Court of Federal Claims to make a concurrent determination as to the propriety of a denial of interest abatement 'would substantially decrease the effectiveness of the statutory design.'" Pet. App. 13 (quoting *Whitney Nat'l Bank*, 379 U.S. at 420).[3]

b. The Fifth Circuit's contrary view in *Beall* is mistaken. That court concluded that by specifically granting jurisdiction to the Tax Court, Congress somehow made administrative interest-abatement decisions

---

[3] In *Freytag* v. *Commissioner*, 501 U.S. 868, 885-889 (1991), this Court held that, for purposes of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, the Tax Court is not a "Department" of the Executive Branch. But whether the Tax Court is viewed as a court or an Executive Branch agency, it is the exclusive forum provided by Congress for reviewing challenges to IRS interest-abatement decisions.

reviewable in federal district courts as well. 336 F.3d at 430; Pet. App. 37. According to the Fifth Circuit, Congress mentioned only the Tax Court in its legislation, and did not mention the federal district courts, because the Tax Court is a statutory court which has only the powers specifically conferred upon it by Congress. 336 F.3d at 430; Pet. App. 36-37. That reasoning, however, is inconsistent with the Court's holding in *Whitney National Bank*. As noted above, the Court in that case held that a grant of jurisdiction to the Federal Reserve Board established the exclusive method of review. *Whitney Nat'l Bank*, 379 U.S. at 420. Like the Tax Court, the Federal Reserve Board possesses only the power to adjudicate controversies that has been specifically conferred upon it by Congress. Yet the Court held that the establishment of a review procedure before the Federal Reserve Board precluded review by the federal district courts. *Ibid.* Thus, legislation that mentions only an Article I court of limited jurisdiction may preclude review in federal district courts.

The *Beall* court similarly erred in concluding that interpreting Section 6404(h) to grant the Tax Court exclusive jurisdiction to adjudicate interest-abatement matters would impliedly repeal the jurisdiction of the district courts over such matters. The House Report accompanying the Taxpayer Bill of Rights 2 states that, under then-present law, "Federal courts generally do not have the jurisdiction to review the IRS's failure to abate interest." H.R. Rep. No. 506, *supra*, at 28. It is thus apparent that Congress understood that, prior to 1996, the district courts could not review the IRS's determination not to abate interest. Whether that conclusion flowed from justiciability concerns or lack of subject-matter jurisdiction, Congress described the pro-

scription under the general concept of jurisdiction, and expressly provided that the Tax Court should have jurisdiction to consider and decide such matters. Thus, the report states that "[t]he Committee believes that it is appropriate for the Tax Court to have jurisdiction to review IRS's failure to abate interest with respect to certain taxpayers," without any suggestion of district court jurisdiction over such claims. *Ibid.* The further explanation of the provision gives no hint that the Secretary's decision not to abate interest might be reviewable anywhere other than the Tax Court:

> The bill grants the Tax Court jurisdiction to determine whether the IRS's failure to abate interest for an eligible taxpayer was an abuse of discretion. The Tax Court may order an abatement of interest. The action must be brought within 180 days after the date of mailing of the Secretary's final determination not to abate interest. An eligible taxpayer must meet the net worth and size requirements imposed with respect to awards of attorney's fees. No inference is intended as to whether under present law any court has jurisdiction to review IRS's failure to abate interest.

*Ibid.* As the Federal Circuit explained, "[c]learly, in 1996, Congress recognized that the courts generally do not have jurisdiction over interest abatement claims. However, Congress did not then grant jurisdiction to district courts and the Court of Federal Claims. Rather, the language of § 6404 vests jurisdiction specifically in the Tax Court." Pet. App. 14.[4]

---

[4] In *Beall*, 336 F.3d at 428 n.11; Pet. App. 33 n.11, the court suggested that the House Report, in describing the then-current law that precluded federal courts from exercising jurisdiction to review the

c. As the Federal Circuit concluded, Pet. App. 16-17, the so-called "anomalies" identified by the Fifth Circuit do not justify departure from the words Congress used to convey its intention. The first of those—that wealthy taxpayers will be without recourse to judicial review—is (as the Federal Circuit observed) no anomaly at all: as noted above, Congress intended to fashion relief for small taxpayers only. See H.R. Rep. No. 506, *supra*, at 28 ("it is appropriate for the Tax Court to have jurisdiction to abate interest with respect to *certain taxpayers*" (emphasis added)); 141 Cong. Rec. 2025 (1995) (material appended to statement of Sen. Bryan). Petitioners' assertion that the statutory distinction between small and large taxpayers violates the latter's due process rights, Pet. 26-28, is unconvincing. As petitioners admit (Pet. 26), prior to the 1996 amendments no taxpayer could obtain review of agency interest-abatement determinations in any court. And, as the Federal Circuit pointed

---

IRS's refusal to abate interest, misused the term "jurisdiction." But, as the Court of Federal Claims below aptly explained (Pet. Supp. App. 102 n.21):

> if the House Report meant to refer to "justiciability" instead of "jurisdiction" in its statement of "present law," then one must assume that it made the same "mistake" when it indicated that "[n]o inference is intended as to whether under present law any court has jurisdiction to review IRS' failure to abate interest." By comparison, the Fifth Circuit interpreted the first reference to "jurisdiction" as meaning justiciability, but the second as truly meaning "jurisdiction." In [this] court's view, this analysis of this legislative history is a *non sequitur*.

In any event, even if the House Report had misused the term "jurisdiction," the fact remains that the contemporaneous judicial construction was that the courts were barred from reviewing the agency determination, and there is no indication that Congress intended to eliminate that bar with respect to any court other than the Tax Court.

out (Pet. App. 16), the precise distinction between smaller and larger litigants that is applied in 26 U.S.C. 6404(h) (Supp. III 2003) is also found in 26 U.S.C. 7430 and is ultimately derived from the more generally applicable Equal Access to Justice Act, 28 U.S.C. 2412(d).

Indeed, the net-worth test of Section 6404(h)(1) simply reflects Congress's judgment that the protection afforded by Section 6404(e)(1) is more appropriate for small than for large taxpayers. Under Section 6404(e)(1), interest may be abated only for administrative errors and delays occurring after the IRS has contacted the taxpayer in writing regarding a deficiency or payment. Once the taxpayer is contacted in writing, he has a choice: he may immediately pay the tax (and any interest that has accrued to that date) and then contest the liability in a refund suit, or he may contest the liability before payment in the Tax Court. If, upon being contacted by the IRS, a taxpayer chooses to pay, no more interest accrues. A taxpayer who chooses to pay upon being contacted in writing, therefore, has fully protected himself against the possibility that any subsequent administrative error or delay will cause additional interest to accrue, and can have no need for the protection afforded by Section 6404(e)(1). Thus, the only taxpayers who require the protection of that section are those taxpayers who, for financial reasons, cannot protect themselves by paying before litigating their dispute with the IRS. The net-worth test of Section 6404(h) thus reflects the fact that small taxpayers may benefit from the protection of judicial review, whereas large taxpayers can typically protect themselves against administrative errors and delays simply by paying the tax asserted to be due.

The second so-called "anomaly," that a taxpayer may have to bring his interest-abatement claim and his substantive refund claim in different courts, is, as the Federal Circuit explained, a "policy concern [that] does not compel a different statutory construction when the statute seems clear." Pet. App. 17. Petitioners' suggestion that the Federal Circuit's rule would require the splitting of a single claim, with preclusive effects on the second litigation, Pet. 29-30, is unfounded. Because a taxpayer could not bring an interest-abatement claim in a refund suit in a district court or the Court of Federal Claims, estoppel could not apply.

4. The question presented in this case is sufficiently important and recurring to warrant this Court's review in an appropriate case. As the district court decisions referenced above establish, the exclusivity *vel non* of the Tax Court's jurisdiction to review determinations of the Secretary denying the abatement of interest is an often-litigated issue. Moreover, the conflict concerns not only which forums are available to a taxpayer seeking review of an administrative denial of interest abatement, but also whether taxpayers who exceed the net-worth requirements of Section 6404(h) may obtain judicial review of agency interest-abatement decisions in any forum.

Nevertheless, this Court's review may not be warranted at this time. At present, the conflict in the courts of appeals is limited to the abstract disagreement between the Fifth Circuit, which held that district courts have concurrent jurisdiction to hear interest-abatement claims, and the Federal Circuit in this case, which held that the Court of Federal Claims lacks jurisdiction over those claims because they can only be brought in the Tax Court. There is currently no circumstance in which taxpayers would be subject to different rules depending

on their residence. All taxpayers nationwide are affected equally by the Federal Circuit's decision, which governs only to the nationwide jurisdiction of the Court of Federal Claims. The Fifth Circuit is the only court of appeals to have confronted the question whether the federal district courts possess jurisdiction to review interest-abatement determinations, and there is at present no conflict among the regional circuits on that question. Accordingly, under the current state of the appellate case law, no taxpayer may obtain review of interest-abatement determinations in the Court of Federal Claims, but there is no binding precedent banning any taxpayer from seeking such review in the district courts. Notwithstanding the current conflict and the importance of the question presented, therefore, the Court may prefer to await an actual conflict concerning district court jurisdiction, should one develop, before reviewing the issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Solicitor General*
EILEEN J. O'CONNOR
*Assistant Attorney General*
KENNETH L. GREENE
BETHANY B. HAUSER
*Attorneys*

DECEMBER 2006

## APPENDIX

1. 26 U.S.C. 6404(e) (1994) provides, in pertinent part:

**(e) Assessments of interest attributable to errors and delays by Internal Revenue Service**

**(1) In general**

In the case of any assessment of interest on—

(A) any deficiency attributable in whole or in part to any error or delay by an officer or employee of the Internal Revenue Service (acting in his official capacity) in performing a ministerial act, or

(B) any payment of any tax described in section 6212(a) to the extent that any error or delay in such payment is attributable to such officer or employee being erroneous or dilatory in performing a ministerial act,

the Secretary may abate the assessment of all or any part of such interest for any period. For purposes of the preceding sentence, an error or delay shall be taken into account only if no significant aspect of such error or delay can be attributed to the taxpayer involved, and after the Internal Revenue Service has contacted the taxpayer in writing with respect to such deficiency or payment.

* * * * *

2. 26 U.S.C. 6404(h) (Supp. III 2003) provides:

**(h) Review of denial of request for abatement of interest**

**(1) In general**

The Tax Court shall have jurisdiction over any action brought by a taxpayer who meets the requirements referred to in section 7430(c)(4)(A)(ii) to determine whether the Secretary's failure to abate interest under this section was an abuse of discretion, and may order an abatement, if such action is brought within 180 days after the date of the mailing of the Secretary's final determination not to abate such interest.

**(2) Special rules**

**(A) Date of mailing**

Rules similar to the rules of section 6213 shall apply for purposes of determining the date of the mailing referred to in paragraph (1).

**(B) Relief**

Rules similar to the rules of section 6512(b) shall apply for purposes of this subsection.

**(C) Review**

An order of the Tax Court under this subsection shall be reviewable in the same manner as a decision of the Tax Court, but only with respect to the matters determined in such order.